Office of Chief Counsel
Internal Revenue Service

memorandum

CC:NER:MAN:TL-N-2653-00
LLDavidow

date:

to: Chief, Examination Division, Manhattan
Attention: John Murray, Team Coordinator

from: District Counsel
Manhattan

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subject: Response to Request for Assistance
Re: [redacted] (EIN [redacted])
Limit on Amount Subject to Refund Claim Under IRC Section 6511(c)
UIL # 6511.00-00

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In accordance with the provisions of section (35)3(19)4 of the Internal Revenue Manual, your office has requested our advice on the question discussed below. This advice is subject to review by the National Office, pursuant to paragraph (4) of that section.

Question Presented:

Is the amount of Federal income tax subject to the taxpayer's refund claims on Form 1120X for the year ending [redacted] limited pursuant to section 6511(c) to amounts paid within the two-year period preceding the filing of the refund claim ($[redacted]), or may the taxpayer be entitled to a refund of the full amount claimed ($[redacted])?

Facts:

Execution of Form 872.

In [redacted], the taxpayer, then known as [redacted], entered into an agreement with the Internal Revenue Service to extend the time in which its Federal income tax liabilities for certain years might be assessed. This agreement was reflected on Form 872 (Consent to Extend the Time to Assess Tax), and covered the taxpayer's income tax liabilities for its [redacted], [redacted], [redacted], and [redacted] (calendar) years. The agreement provided that the taxpayer's income tax for those years might be assessed "at any time on or before [redacted]." The validity of this agreement is not here in question.

Boilerplate Language.

The version of the Form 872 on which the agreement was executed is the version that carries the notation "Rev. August 1988." The Form, as printed, contains the statement that tax due "may be assessed at any time on or before," followed by a line serving to identify the space on which the parties were to fill in the appropriate date (in the present case, the date entered was [redacted]). Immediately under this line appears the legend: *(Expiration date)* [italics in original]. Thus, the Form 872 as executed by the parties may be read to define the date [redacted] as the "expiration date."

Paragraphs (2) and (3) of the Form 872 contain the following boilerplate language:

(2) This agreement ends on the earlier of the above expiration date or the assessment date of an increase in the above tax that reflects the final determination of tax and the final administrative appeals consideration. ... Some assessments may not reflect a final determination and appeals consideration and therefore will not terminate the agreement before the expiration date. Examples are assessments of: (a) tax under a partial agreement; (b) tax in jeopardy; (c) tax to correct mathematical or clerical errors; (d) tax reported on amended returns; and (e) advanced payments. ...

(3) The taxpayer(s) may file a claim for credit or refund and the Service may credit or refund the tax within 6 months after this agreement ends.

Assessment of Deficiencies.

On [redacted], the taxpayer executed Forms 870 (Waiver of Restriction on Assessment and Collection of Deficiency in Tax and Acceptance of Overassessment) for its [redacted] and [redacted] years, permitting the Service to assess deficiencies of $[redacted] for [redacted] and $[redacted] for [redacted]. The Forms 870 executed by the taxpayer were a version of the Form that carried the legend "Rev. February 1986," and contained boilerplate language in which the taxpayer consented to the immediate assessment and collection of any deficiencies and agreed that it would "not be able to contest these years in the United States Tax Court, unless additional deficiencies are determined for these years."

These deficiencies were assessed on [redacted].

Refund Claims.

On [redacted], the taxpayer filed Forms 1120X (Amended U.S. Corporation Income Tax Return) for [redacted] and [redacted], claiming refunds in the amounts of $[redacted] and $[redacted], respectively. Since the amount of the refund claim for [redacted] is less than the amount of tax paid within the two-year period preceding the filing of the claim, only the refund claim for [redacted] is here in issue.

Discussion:

The Six-Month Rule of Section 6511(c).

Section 6511(c) contains an exception to the general rule of section 6511(a) that a refund claim must be filed within three years from the time of the filing of the return or two years from the time of the payment of the tax, whichever expires later. Sections 6511(c)(1) and (2) provide as follows:

> (1) Time for filing claim. The period for filing claim for credit or refund ... shall not expire prior to 6 months after the expiration of the period within which an assessment may be made pursuant to the agreement or any extension thereof under section 6501(c)(4).
>
> (2) Limit on amount. If a claim is filed ... after the execution of the agreement and within 6 months after the expiration of the period within which an assessment may be made pursuant to the agreement or any extension thereof, the amount of the credit or refund shall not exceed the portion of the tax paid after the execution of the agreement and before the filing of the claim, ... plus the portion of the

> tax paid within the period which would be applicable under subsection (b)(2) if a claim had been filed on the date the agreement was executed.

Section 6511(b)(2)(B) states that if a refund claim is not filed within three years after the filing of the tax return, the amount of the refund "shall not exceed the portion of the tax paid during the 2 years immediately preceding the filing of the claim."

Thus, if the refund claim filed by the taxpayer for the [redacted] year satisfies the six-month rule of section 6511(c)(1) (and is determined to be otherwise allowable), the taxpayer would be entitled to a refund of the entire amount shown on the Form 1120X for that year, viz., $[redacted]. By contrast, if the claim does not satisfy the six-month rule, then under section 6511(b)(2)(B) the taxpayer would be entitled to a refund (again, assuming that the claim is determined to be otherwise allowable) only of those amounts paid within two years of the filing of the claim, viz., $[redacted].

Paragraph (b) of Treas. Reg. § 301.6511(c)-1 (relating to special rules applicable in case of extension of time by agreement) states as follows:

> (b) *Period in which claim may be filed.* Claim for credit or refund of an overpayment may be filed ... *at any time within which an assessment may be made pursuant to an agreement*, or any extension thereof, under section 6501(c)(4), and for 6 months thereafter.

(Emphasis added.)

Thus, under both section 6511(c)(1) and the regulations thereunder, the critical question is whether the "time within which an assessment may be made" is the expiration date of the Form 872, i.e., [redacted], or the earlier date on which an assessment was in fact made (following the taxpayer's execution of a Form 870 waiving restrictions on assessment).

"Final Determination of Tax."

The boilerplate language of the Form 872 is critical here: "This agreement ends on the earlier of the above expiration date or the assessment date of an increase in the above tax that reflects the final determination of tax and the final administrative appeals consideration." Logically, if the agreement reflected on Form 872 terminates as the result of an

assessment, the "expiration date" shown on the Form becomes irrelevant.

Paragraph (3) of the Form 872 supports this interpretation by stating that the refund claim may be filed "within 6 months after this agreement ends" (not, it should be noted, "within 6 months after the expiration date").

The remaining question is whether the assessment of tax pursuant to the taxpayer's execution of a Form 870 in fact terminated the agreement reflected on Form 872 to extend the statute. Under paragraph (2) of the Form 872, in order for an assessment to terminate the agreement before the expiration date, the assessment must reflect the "final determination of tax and the final administrative appeals consideration." As indicated above, paragraph (2) itself contains several examples of circumstances in which an assessment will not be considered to reflect such a "final determination" or "final administrative appeals consideration." The examples listed are assessments based on partial agreements, jeopardy assessments, assessments to correct mathematical or clerical errors, assessments of tax reported on amended returns, and assessments of advanced payments. In the present case, by contrast, the assessment is based on the execution of Form 870, and thus does not fall within any of the examples of "non-final" assessments given in paragraph (2). Nevertheless, the examples listed in paragraph (2) do not purport to be an exhaustive list of types of assessments that do not reflect a "final determination of tax."

Agreements extending the period of limitation on assessment are interpreted according to standard contract principles. Stange v. United States, 282 U.S. 270 (1931); Kronish v. Commissioner, 90 T.C. 684, 693 (1988); Piarulle v. Commissioner, 80 T.C. 1035, 1042 (1983). In the absence of ambiguity, the express terms of the written agreement are controlling. Kronish v. Commissioner, supra at 693.

In Estate of Jones v. Commissioner, T.C. Memo. 1996-101 (1996), the Court was required to construe a Form 872-A the second paragraph of which was essentially identical to paragraph (2) of the Form 872 executed by parties in the present case. At issue was whether the taxpayer's execution of a Closing Agreement on Final Determination Covering Specific Matters resolving only a single issue in dispute (an art tax shelter adjustment), and leaving other issues unagreed, had the effect of terminating the agreement reflected on Form 872-A. The taxpayer in that case was arguing that the Service had failed to assess within the statutorily required period.

> Petitioners contend that *any* assessment of tax for the 1981 year is what is meant by the term "tax" in the phrase "the final determination of tax." Respondent, on the other hand, argues that only a closing agreement covering all adjustments or issues for an entire year can finalize a taxpayer's liability for that year. Respondent's argument presumes that the phrase "the final determination of tax" means the final determination of the taxpayer's tax for the entire year.
>
> We agree with respondent that the words used in the agreement evince an intent that only a final determination of the Joneses' tax for the entire period covered by the agreement would terminate the agreement. Paragraph (2) of the agreement states that "Some assessments do not reflect a final determination" and then sets forth some examples, including the assessment of "tax under a partial agreement" and the assessment of "advance payments." We interpret the closing agreement with respect to the art tax shelter to be a partial agreement, in that the closing agreement did not purport to cover the Joneses' entire 1981 taxable year. The closing agreement was limited only to the art tax shelter adjustment. Consequently, the assessment of tax with respect to the art tax shelter adjustment was not a final determination of tax as called for in the Form 872-A.

Since the Form 870 executed by the taxpayer in this case for its [redacted] year covered all the issues in dispute for that year, it clearly does not constitute a partial agreement, like the one in issue in Estate of Jones. The question, however, is whether it constitutes a "final determination of tax," akin to the closing agreement that underlay the parties' dispute in Estate of Jones.

Closing Agreement Requirement.

As discussed below, the requirement of paragraph (2) that the assessment reflect a final determination of tax is apparently meant to invoke the provisions of section 7121, which gives the Commissioner the authority to enter into closing agreements. Under section 7121, a closing agreement is final and conclusive, and (in the absence of a showing of fraud, malfeasance, or misrepresentation of a material fact) the case to which it relates cannot be reopened as to the matters agreed upon. Nor can a closing agreement (or any determination, assessment, collection, payment, abatement, refund or credit resulting from a closing agreement) be modified or set aside in any other suit or proceeding. Treas. Reg. § 301.7121-1(c).

26 C.F.R. § 601.202(b) identifies the forms to be used for closing agreements. That provision states:

> (b) *Use of prescribed forms.* In cases in which it is proposed to close conclusively the total tax liability for a taxable period ending prior to the date of the agreement, Form 866, Agreement as to Final Determination of Tax Liability, generally will be used. In cases in which agreement has been reached as to the disposition of one or more issues and a closing agreement is considered necessary to insure consistent treatment of such issues in any other taxable period Form 906, Closing Agreement as to Final Determination Covering Specific Matters, generally will be used.

See also Rev. Proc. 68-16, 1968-1 C.B. 770 (1968).

The fact that the phrase "final determination" is used in the titles of both forms of closing agreement, i.e., Forms 866 and 906, but is not used in the title or in the boilerplate language of Form 870, is strong evidence that the phrase "final determination of tax," as used in paragraph (2) of Form 872, refers to a closing agreement on Form 866 or 906, but not to a waiver on Form 870.

In light of the foregoing, it is unlikely that any agreement reflected on a Form 870 (Waiver of Restrictions on Assessment and Collection of Deficiency in Tax and Acceptance of Overassessment) would be considered a closing agreement within the meaning of section 7121.

This conclusion is consistent with the opinion of the Court in Fudim v. Commissioner, T.C. Memo. 1994-235 (1994), a case dealing with the timeliness of a notice of deficiency. In Fudim, the taxpayer had signed an examining agent's report, thus manifesting his acceptance of the agent's findings. The taxpayer's position was that his acceptance of the report was equivalent to the execution of a closing agreement, thus triggering the statute of limitations on the issuance of a notice of deficiency. In rejecting this argument, the Court makes an apparently gratuitous reference to a Form 870:

> [P]etitioner's argument that the acceptance of the examining agent's report by the parties was a final determination of his tax liabilities purports to equate it with execution of a closing agreement, the only statutorily authorized method by which the Commissioner and the taxpayer can finalize the taxpayer's tax liability for a particular year. Sec. 7121; *Estate of Meyer v. Commissioner*, 58 T.C. 69, 70 (1972); see

> also *Botany Worsted Mills v. United States*, 278 U.S. 282, 288 (1929). However, signing an examining agent's report or a Form 870, and its subsequent acceptance by respondent, does not constitute a closing agreement for purposes of section 7121. *Estate of Barrett v. Commissioner*, T.C. Memo. 1994-167; *Smith v. Commissioner*, T.C. Memo. 1991-412; *Vitale v. Commissioner*, T.C. Memo. 1988-233. Doing so merely waives the statutory notice requirements imposed upon respondent by section 6213(a). *Consolidated Freightways, Inc. v. United States*, 223 Ct. Cl. 443, 620 F.2d 862, 868 (1980); *Maloney v. Commissioner* [Dec. 42,912(M)], T.C. Memo. 1986-91. Consequently, we find that petitioners' tax liabilities for the years in issue had not been finally determined and that the period of limitations with regard to petitioners' 1986 income tax liability had not expired when respondent issued the notice of deficiency.

(Footnote omitted.)

In a footnote to its reference to the Form 870 in the quoted paragraph, the Court stated:

> Form 870 (Waiver of Restrictions or Assessment and Collection of Deficiency in Tax and Acceptance of Overassessment) contains language that is almost identical to the waiver language above petitioners' signatures on the examining agent's reports.

In other words, the fact that the waiver language in the Form 870 was almost identical to the waiver language in the examining agent's report means that the Court's conclusion that the taxpayer's acceptance of the report did not constitute a final determination would apply with equal force to a taxpayer's execution of a waiver on Form 870.

The logical conclusion from this is that, in the present case, the assessment of the taxpayer's deficiency for [redacted] pursuant to a waiver on Form 870 is not an assessment that reflects the "final determination of tax and the final administrative appeals consideration" within the meaning of paragraph (2) of Form 872. Thus, the date on which the deficiency was assessed does not terminate the agreement reflected on Form 872. This in turn means that the agreement reflected on Form 872 ends on the expiration date shown on that Form, i.e., [redacted], rather than on the assessment date.

Thus, pursuant to sections 6511(c)(1) and (2), any refund claim filed within six months after [redacted], is timely

with respect to any amount not in excess of (1) the amount paid before the filing of the claim, plus (2) the portion of the tax paid within the period which would be applicable under subsection (b)(2) if a claim had been filed on the date the agreement was executed.

Inapplicability of Estoppel.

Several cases have held that the execution of a Form 870-AD (a waiver similar in purpose to a Form 870, but executed while the case is within the jurisdiction of the Service's Appeals Division) precludes a taxpayer, by reason of estoppel, from filing a refund claim with respect to any deficiency to which the waiver relates. See, e.g., Aronsohn v. United States, 988 F.2d 454, 456-457 (3rd Cir. 1993); Kretchmar v. United States, 9 Cl. Ct. 191 (1985). In these cases, the courts acknowledged that the Form 870-AD waiver did not meet the formal requirements of a closing agreement, but held that the taxpayer was nevertheless equitably estopped from bringing a refund suit, at least in situations where the Government had made concessions in a settlement agreement embodied in a Form 870-AD waiver and had detrimentally relied upon the agreement (i.e., by allowing the statute of limitations to expire on the conceded issues). The court in Kretchmar based its conclusion in large part on its analysis of the boilerplate language of the Form 870-AD there in dispute, focusing on what it refers to as the "following unambiguous statement ... directly above the plaintiffs' signatures":

> If this offer is accepted for the Commissioner, the case shall not be reopened in the absence of fraud, malfeasance, concealment or misrepresentation of material fact, an important mistake in mathematical calculation, or excessive tentative allowances of carrybacks provided by law; and no claim for refund or credit shall be filed or prosecuted for the year(s) stated above other than for amounts attributed to carrybacks provided by law.

The Aronsohn court referred to the fact that the Form 870-AD in dispute in that case "includes in its terms an explicit preclusion of refund or credit claims for the years covered under the settlement," and concluded that such an "explicit preclusion" may equitably bind the taxpayer by estoppel from bringing a subsequent refund action.

See also Elbo Coals, Inc. v. United States, 763 F.2d 818, (6th Cir. 1985), affg. 588 F. Supp. 745 (E. D. Ky. 1984), a Sixth Circuit case containing reasoning identical to that in Aronsohn and Kretchmar.

On the other hand, a much earlier Sixth Circuit case had reached the opposite conclusion in construing a Form 870 that contained very different boilerplate language. See Joyce v. Gentsch, 141 F. 2d 891 (6th Cir. 1944). The court in Joyce refused to hold that the taxpayer was estopped from seeking a refund after signing a modified Form 870 settling a tax dispute and after the statute of limitations had run against the government. The Form 870 interpreted by the Sixth Circuit in Joyce lacked the language relied in Aronsohn, Kretchmar, and Elbo Coals, Inc., but instead contained the statement that the execution of the Form would not "preclude the assertion of a further deficiency in the manner provided by law should it subsequently be determined that additional tax is due...." The Joyce court noted that, with this statement, the Form 870 manifested "an intention not to bind the Government to a final settlement...."

The Form 870 executed by the taxpayer in the present case does not contain a statement equivalent to the one quoted from any of the estoppel cases cited above (including Joyce). The statement preceding the space for the taxpayer's signature merely recites that the taxpayer, by signing the waiver, understands that it "will not be able to contest these years in the United States Tax Court, unless additional deficiencies are determined for these years." No mention is made of the taxpayer's not being permitted to bring a refund suit in a forum other than the Tax Court, and the clear implication is that the taxpayer would be entitled to bring a refund suit in the Tax Court if the Government determined additional deficiencies for the year covered by the waiver.

The absence of any statement of "explicit preclusion" (in the words of the court in Aronsohn), and the contrary implication of the language actually contained in the Form 870, would almost certainly be fatal to an argument that bars the present taxpayer from asserting a refund claim in this case. Thus, estoppel cases like Aronsohn, Kretchmar, and Elbo Coals, Inc. should have no bearing on this issue.

Conclusion:

As explained above, the six-month period of section 6511(c) commences after [redacted], the expiration date of Form 872, rather than [redacted], the assessment date. Since the refund claim was filed within this six-month period, the taxpayer would be entitled to a refund of the entire amount shown on the Form 1120X for that year, viz., $[redacted] (provided that the refund claim is determined to be otherwise allowable).

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